

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

CONSOLIDATED BUS TRANSIT, INC. AND  
LONERO BUS TRANSIT, INC., A Single Employer

AND

2-CA-36492

TEAMSTERS FOR A DEMOCRATIC UNION

*Burt Pearlstone, Esq.*, for the General Counsel  
*Julian J. Gonzalez, Esq.*, of Detroit, Michigan, for  
Teamsters for a Democratic Union  
*Richard I. Milman, Esq.*, and *Michael J. Mauro, Esq.*,  
(*Marshall M. Miller Associates, Inc.*) of Lake  
Success, New York, for Consolidated Bus Transit,  
Inc. and Lonero Bus Transit, Inc.

DECISION

Statement of the Case

**ELEANOR MACDONALD, Administrative Law Judge:** This case was tried on four days from May 9 to May 12, 2005. This case had been consolidated for hearing with Cases 2-CA-34661, et al, and after the close of the consolidated hearing the cases were severed for decision. The Decision in Cases 2-CA-34661, et al, was issued in JD(NY)-32-05.<sup>1</sup> The instant Complaint alleges that Respondent Consolidated, in violation of Section 8 (a) (1) and (3) of the Act, relinquished a majority of its school bus routes and transferred employees to Respondent Lonero because its employees engaged in union and protected concerted activities on behalf of Teamsters for a Democratic Union. The Respondent denies that it has violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all the parties in July 2005, I make the following<sup>2</sup>

Findings of Fact

I. Jurisdiction

Respondent Consolidated Bus Transit, Inc., a New York corporation with an office and place of business at 50 Snedecker Avenue, Brooklyn, New York, is engaged in providing school

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<sup>1</sup> In order to avoid lengthy repetitions of factual findings and legal conclusions, I will assume that the reader of the instant decision is familiar with the previous decision in this consolidated hearing.

<sup>2</sup> At page 1981, line 1, the correct word is "accidents"; at page 2178, line 17 and thereafter, the term "Y-bite" should be replaced by "WyBite".

bus services to the New York City Department of Education from various locations. Respondent Consolidated annually derives gross revenues in excess of \$250,000 and purchases and receives goods and products in excess of \$5,000 directly from suppliers located outside New York State. Respondent Loner Bus Transit, Inc., a New York corporation with an office and place of business located at 50 Snedecker Avenue, Brooklyn, New York, is engaged in providing school bus services to the New York City Department of Education from various locations. Respondent Loner annually derives gross revenues in excess of \$250,000 and purchases and receives goods and products in excess of \$5,000 directly from suppliers located outside New York State. The parties agree, and I find, that at all material times Respondent Consolidated and Respondent Loner have been affiliated business enterprises with common officers, ownership, directors, management and supervision and have share common premises and facilities. The parties agree, and I find, that Respondent Consolidated and Respondent Loner constitute a single employer within the meaning of the Act. The parties agree, and I find, that Respondent Consolidated and Respondent Loner constitute an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

I find that Local 854, International Brotherhood of Teamsters, and Local 1181, Amalgamated Transit Union, AFL-CIO, are labor organizations with the meaning of Section 2 (5) of the Act. I find that Teamsters for a Democratic Union is an organization comprised of rank and file members of the International Brotherhood of Teamsters that exists to reform the International Brotherhood of Teamsters.<sup>3</sup>

## II. Alleged Unfair Labor Practices

### A. Background

The parties agree that the following individuals are supervisors and agents of Respondent:

Joseph Curcio	President
Anthony Strippoli	Chief Operations Manager

It is agreed that Local 854 is the exclusive collective-bargaining representative of the following unit of Consolidated Bus Transit, Inc., employees:

All employees including, *inter alia*, drivers, escorts, van drivers, helpers and mechanics, but excluding guards and supervisors as defined in the labor Management Relations Act, as amended.

It is agreed that Local 1181 is the exclusive collective-bargaining representative of the following unit of Loner Bus Transit, Inc., employees:

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<sup>3</sup> Respondent argues that the Charging Party did not have standing to file the instant charge. This position is without merit. The Supreme Court has observed that the Act "omits any requirement that the charge be filed by a labor organization or an employee" and the Court further noted that "Senator Wagner, sponsor of the Bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board." *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17-18 (1943). Based on the Supreme Court's discussion, it has been stated that, "Anyone may file a charge." *NLRB v. Local 364, Chauffeurs, Teamsters & Helpers*, 274 F. 2d 19, 25 (7<sup>th</sup> Cir. 1960).

All drivers, shop employees and matrons-attendant escorts excluding supervisory and clerical employees.

Respondents Consolidated and Lonero operate under the trade name "Consolidated".  
 5 The precise legal entities were not defined herein, but it is clear that the name "Consolidated" is used as an umbrella for the two bus companies controlled by Curcio.<sup>4</sup>

## **B. Procedures of the Department of Education**

10 This case arises out of the procedures established by the New York City Department of Education, Office of Pupil Transportation (OPT), for the acquisition and relinquishment of bus routes by companies transporting pupils pursuant to contracts with the Department. The evidence shows that the procedures which existed for many years are being changed by the  
 15 administration of Mayor Michael Bloomberg. To deal with the issues in the instant case it is necessary to summarize the former procedures and to understand the changes that are being effected.

I credit the testimony of Richard Scarpa, Director of the OPT, who was called by  
 20 Counsel for the General Counsel to explain the relevant procedures.<sup>5</sup> I also rely on the testimony of Curcio and Strippoli.

The OPT and the bus companies which operate the vehicles to transport students to New York City public schools have defined their arrangements in a series of multi-employer five-year contracts the last of which had a term from 2000 to 2005. The five-year contract covers  
 25 many hundreds of school bus routes operated every day by a multitude of contractor bus companies. At the time of the instant hearing the OPT and the contractor bus companies had completed negotiations for a new contract commencing with the school year in September 2005. The new contract will be discussed below.

30 The various contractor school bus companies obtain their routes by means of an extremely complicated bid system known as a "pick." The bidding is arranged so that each route will be bid at a table set up for that purpose in the pick location. The bidding for each route begins at a set time of day and the order in which companies may bid is established by the OPT.

35 The school bus routes are identified by location and type of vehicle to be operated. For example, one route is known as WBX-SB, meaning "within the Bronx, standard bus." Another route to transport children in wheelchairs is designated WM-HL, meaning "within Manhattan, hydraulic lift".

40 A major issue in the instant case relates to the WBX-SB route. It is necessary to operate hundreds of standard buses in the Bronx every day. The rights to operate these vehicles are held by several bus companies. Based on the initial contract price obtained by the school bus company when it first began performing a particular route, each contractor school bus company  
 45 receives a price per vehicle per day on a certain route that is individual to that contractor on that route.<sup>6</sup> Thus, one contractor may receive \$100 more per day than another bus company to

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<sup>4</sup> Although no details were offered at the hearing the record shows that Curcio is a part owner of the bus companies.

<sup>5</sup> Scarpa has served an administrator in the OPT since 1992.

<sup>6</sup> The price per vehicle per day is the full payment to operate the vehicle with a driver and an  
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operate vehicles performing identical services on the same route.<sup>7</sup> Furthermore, as is the case with Respondent herein, the same umbrella company operating under several different corporate entities may provide identical services on a route but at widely varying prices per vehicle per day.

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A company retains its fixed price per vehicle per day on a particular route for all the years that it continues to operate the route. If a school bus company agrees to add vehicles to a route it will receive the same price per vehicle per day for the additional vehicles as it has received for the already operating vehicles. However, every year the price per vehicle per day on each route is raised by the lesser of the CPI or the actual increase in costs experienced by the contractor.

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On each route operated by a contractor, there are specified numbers of vehicles which the bus company must provide every year. These are known as the "contract vehicles" and they are specified in the five year contracts entered into by the OPT and the bus companies. On a yearly basis the bus companies also agree to provide "additional vehicles" for each route at the same price per vehicle per day. The designation "additional vehicles" is applied to the number of vehicles a contractor has agreed to provide on a certain route for a one year period. As an example, a company may be committed to providing 5 "contract vehicles" on a certain route within the Bronx but it may have obtained the right to provide 100 "additional vehicles" on the same route. Scarpa testified that the policy of the OPT had been to permit companies to give up the routes performed by "additional vehicles" at the end of the school year or at the pick for the next school year. The vehicles thus "thrown in", according to the parlance in the industry, become "additional additional vehicles" which are then offered to other companies at the pick. Other companies may bid on these thrown in vehicles in the pick order for that route. Thus, if one company throws in ten additional vehicles, the next company to bid may pick the right to operate all or some of them. If only some of these vehicles are picked by the first bidder then the second bidder in order has the right to bid on some or all of the remaining vehicles. Respondents Consolidated and Lonero are treated as different companies under this policy. Thus, Consolidated may throw in vehicles and Lonero may pick them up, and vice versa.

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According to procedures known as the Mollen Agreement drivers and escorts who lose their jobs when a company ceases to operate its runs are entitled to pick new jobs with the companies that have obtained runs at the pick. The Mollen Agreement provides that these employees may not be paid at a rate lower than their previous rate of pay. Employees whose runs are taken over by another company have priority in obtaining jobs with school bus operators.

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At issue in the instant case is certain action taken by Respondent at the bidding for the school year beginning in September 2004. The bidding was conducted on August 24, 2004 at an event called the "September pick".

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Before the September 2004 pick took place the contracting bus companies had access to various documents generated by the OPT which showed all the existing routes city-wide and the contractors currently operating those routes.<sup>8</sup> The documents showed the number of

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escort, also called a matron.

<sup>7</sup> Similarly, a contractor may provide identical types of service on more than one route and receive a different price for each route.

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<sup>8</sup> I shall avoid any detailed description of those documents except to the extent required by the facts of the instant case.

vehicles operated on each route by individual companies and the corresponding price per vehicle per day. The OPT documents also showed how the bidding would be arranged and in what order each company would be allowed to bid on routes for the coming school year. Pursuant to the OPT policy, the bidding for each route, such as WBX-SB, proceeded in an order whereby the company currently obtaining the lowest price per vehicle per day on that route was allowed to bid first. Then the company receiving the second lowest price per vehicle proceeded with its bid. After a company bid on a certain number of vehicles per day on each route, the company then proceeded to pick which of the individual "runs" its vehicles would operate on that route. Used in this sense, the term "run" signifies a set of addresses at which pupils are picked up and delivered to one or more schools. Of course, a run also includes taking the children home after school. Thus, a company which has 20 vehicles operating a certain route each day will select from the available runs on that route. A detailed knowledge of the route area and traffic patterns is an asset in selecting the runs to be completed by the company's vehicles.

### **C. Respondent's Actions at the September Pick**

Joseph Curcio testified that he attended the pick on August 24, 2004 with Anthony Strippoli and some other employees of Respondent. Before the pick Curcio and Strippoli had held confidential discussions about the future of Respondent and how best to structure the work to achieve maximum financial return. Curcio and Strippoli tried to devise a strategy to raise the price per vehicle per day received by Respondent where possible. The two men consulted various OPT documents available before the pick which showed how many vehicles in each category of route were operated by the various contracting bus companies and showed the price obtained by each company on each route. The two men also noted the order of bidding for each route at the September pick. Curcio and Strippoli did not inform anyone of their plans, not even the other employees who accompanied them to the pick. These employees were present only to help select the particular runs on each route to be operated by the company in the coming school year.

Curcio testified that his aim at the pick was to relinquish routes where the revenue per vehicle was low and replace those routes with ones that paid more per vehicle. Curcio testified about the pick schedule entitled "Special Education Door to Door Transportation" with respect to a route called "Item Number WBX-SB."<sup>9</sup> Nine companies were listed as having routes in that item. Respondent Consolidated was the first contractor on this list with a price per vehicle per day of \$561.41.<sup>10</sup> The list showed that Consolidated would pick at 7:00 am in the bidding on August 24. Consolidated would pick first because it received the lowest price per vehicle for that item in the bidding. The other bus companies would pick in order of ascending price per vehicle at 20 minute intervals. The sixth bidder, at 8:40 am, would be Respondent Lonero which received \$625.37 per vehicle per day on that route.<sup>11</sup> The last bidder earned the top price of \$635.67 per vehicle per day. Curcio and Strippoli had discussed their strategy for Item Number WBX-SB and when the bidding opened Consolidated threw in all of its additional vehicles, keeping only the number of vehicles that the five-year OPT contract obliged it to retain. Thus, Consolidated kept its five contract vehicles and threw in 168 additional vehicles.

<sup>9</sup> This document is General Counsel's Exhibit # 66, page 10.

<sup>10</sup> The route held by Consolidated was designated WBX-SB-JO. The last two letters stand for Jodi Bus, a company once owned by Curcio's father. The figure of \$561.41 is the price obtained for the school year 2004-05.

<sup>11</sup> The route held by Lonero was designated WBX-SB-VQ. The last two letters indicate that the route was once owned by Varsity Bus in Queens, New York. The figure of \$625.37 is the 2004-05 school year price.

Curcio explained that throwing in the 168 vehicles was a calculated business risk. In September 2003 he had purchased a number of WBX-SB routes owned by Varsity Transit. These routes were the ones now owned by Lonero and receiving \$625.37 per vehicle per day. Curcio and Strippoli had decided that Lonero would try to pick up as many of the 168 routes thrown in by Consolidated as were available when Lonero's turn came in the bidding. Curcio and Strippoli knew that most bus companies keep from 10% to 15% of their vehicles as spares. Because the bidding took place only two weeks before the start of the school year, they believed that the bus companies on the list which had the right to bid after Consolidated and before Lonero could not pick up most of the 168 additional thrown in runs. These companies would not have enough vehicles on hand to operate extra routes. But Lonero could use the extra vehicles from the thrown-in Consolidated routes if it were successful in picking these routes in the bidding. In the event, Lonero was successful in picking up 153 runs out of the 168 thrown in by Consolidated. Thus, Respondent had rid itself of 168 runs earning \$561.41 per vehicle per day and had obtained 153 of those runs at \$625.37 per vehicle per day. Curcio testified that he and Strippoli had estimated that the increase in revenue to Respondent as a result of his actions with respect to the WBX-SB routes would amount to \$1.6 million to \$1.7 million per year.<sup>12</sup> Curcio acknowledged that Respondent had never before thrown in such a large amount of runs. Due to the purchase of Lonero in September 2003, Curcio was in a position to pick up a large number of runs at a much higher price.

Curcio acknowledged that all the employees moving from Consolidated to Lonero would get an immediate pay increase under the terms of the Local 1181 collective-bargaining agreement. Once they reached the top contract rate, the drivers would earn \$80 to \$100 more per week than was the case under the existing Local 854 contract. Curcio's testimony did not compare the relative wages of escorts under the Local 1181 and 854 contracts. Employees newly covered under the Local 1181 contract would be required to wait 90 days for health insurance coverage and they would not receive pay for the Christmas and Easter week holidays until the second year of employment with Lonero.

Curcio testified that at the September pick Consolidated also threw in some runs from Item Number WM-HL (within Manhattan, hydraulic lift). Curcio testified that this route earned \$539.83 per vehicle per day. Respondent had to keep its five contract runs on this route, but it threw in its 29 additional runs. Curcio testified that a company named Atlantic (also known as Amboy) threw in 17 hydraulic lift vehicles in Item Number WBX-HL and these were picked up by Consolidated at a rate of \$615.09 per vehicle per day.<sup>13</sup> Consolidated was able to bid first on these thrown-in runs because it had the lowest price on the list for this item. Curcio and Strippoli had not known that this opportunity would exist until the day of the pick when the 17 additional vehicles became available.

Curcio had not informed any union officials of his intentions prior to the pick. The presidents of all the unions representing school bus employers were present at the pick and they learned the results after it was over. In addition, Respondent Consolidated sent notices by Fed Ex to all employees who would lose their runs as a result of the decrease in routes informing them of OPT procedures to obtain new runs under the Mollen Agreement.

Curcio testified about his reasons for choosing a somewhat risky strategy at the

<sup>12</sup> Curcio multiplied \$65 per day additional for each run by 153 runs times 180 days in the school year.

<sup>13</sup> This item is on page 9 of General Counsel's Exhibit # 66.

September 2004 pick. Curcio explained that in 2004 he was a school bus contractor representative on the multi-employer team negotiating the new five-year contract with the OPT. A major item in the negotiations for the contract to take effect in 2005 was a requirement that companies keep all of their routes, both the so-called contract routes and the additional routes, for the five year duration of the contract. Curcio was aware from his role in the ongoing negotiations that if Respondent Consolidated did not throw in its lower priced runs at the September 2004 pick it would be required to operate them for five years beginning in September 2005. Respondent would have been stuck with 168 vehicles obtaining the lowest prices on the route for the next five years. Curcio described the situation as "a do-or-die time in the industry." Curcio testified that he wanted to structure his companies to raise the daily rate per vehicle over the next five years. After 30 years working in the industry, he wanted to be able to retire just as his father had done.

Scarpa testified that he was directly involved in the negotiation of a new five-year contract with the school bus contractors. Scarpa stated that agreement had been reached by the contractors and the attorney for OPT. Scarpa testified on May 11, 2005 and he stated that the formal agreement would be ready by the end of the week in which he was testifying and then would go to the New York City Corporation Counsel and the City Comptroller for approval. The contract would be signed no later than June 30, 2005. Scarpa confirmed that the annual practice of throwing in additional vehicles and hoping to pick up routes that pay a higher price per vehicle per day was ended. The September 2004 pick was the last at which bus companies would be allowed to throw in work. Henceforth, additional vehicles must be operated for the length of the five-year contract with OPT. Scarpa emphasized that the process of throwing in and picking up routes had occurred in the past but would not occur in the future.

#### **D. Results of Respondent's Actions at the Pick**

Curcio testified that at the close of the August 24 pick, there was a net loss of 179 or 180 runs operated by members of Local 854 working for Consolidated. The 153 runs obtained by Lonero were manned by members of Local 1181. Thus, the pick resulted in a mass layoff of Consolidated drivers and escorts. The layoff took effect in inverse order of seniority on the Consolidated seniority list maintained by Local 854. Curcio testified that it is a longstanding practice in the industry for school bus companies to throw in routes. The unions understand that this may happen and they have never grieved company decisions to give up their routes.

The Local 854 Consolidated seniority list for summer 2004 contains the names of 300 drivers. The Consolidated seniority list compiled after the layoffs resulting from the September 2004 pick shows 121 drivers and 5 shapes. No lists for escorts were introduced at the instant hearing.

Strippoli testified that after the September 2004 pick Consolidated retained 120 vehicles operating various types of school bus routes. Five of these were "straight buses", that is, regularly sized and configured school buses. There were 17 mini vans which carried fewer pupils than the straight buses. The rest of the routes required vehicles with hydraulic lifts for wheelchairs.

The record contains no evidence to contradict Curcio's testimony that employees who were laid off from Consolidated obtained jobs at Lonero pursuant to the procedures of the Mollen Agreement.

Mildred Rios, employed as an escort by Consolidated, testified that she was close to number 300 on the seniority list and she did not obtain a job with Lonero. After the September

2004 pick Rios received a telegram instructing her to report to a location to pick a new job. Following the pick Rios went to the Consolidated office to obtain her personnel file. There she and other former Consolidated employees saw Strippoli and complained that they were losing their jobs with Consolidated. Strippoli said he could not do anything about the situation. Then

5 Curcio came out and spoke to them saying, "You all know why this happened. I've been in this business for 20 years and I've never had any problems with anybody. So why can't you have problems." Rios eventually managed to work for Consolidated despite the fact that her position on the seniority list did not give her a claim to a job.

10 Angel Garces, a bus driver employed by Respondent Consolidated, identified the work assignments of various employees who are active in support of the TDU. As was established at the instant hearing and described in JD(NY)-32-05, Garces is active and visible in his support of the TDU.<sup>14</sup> According to Garces, other current Consolidated employees who are active and visible supporters of the TDU and whose activities are described in JD(NY)-32-05, are Jose

15 Naranjo, Pedro Garcia, Jose Estevez, Al Salimone, Felix Bourdier and Renzo Lopez.<sup>15</sup> I note that Garces did not name all the TDU supporters identified in the instant record and named in JD(NY)-32-05 who still work for Consolidated. These include Jose Villarin, Salomon Viteri, Nicholas Garcia and Santiago Jimenez. Certain employees who are active and visible in their support of the TDU were lower on the seniority list at Consolidated, and when the routes were

20 thrown in at the September pick they obtained routes at Lonero. According to Garces, the following TDU supporters now work at Lonero: Salomon Viteri, Pedro Paniagua, Desar Perez, Sergio Tapia, Eladio Novas, Johnny Salgado, Freddy Seden, Pedro Urena and Anna Pagan.<sup>16</sup> Garces did not identify any TDU activists who were laid off from Consolidated but did not go to work for Lonero. Garces stated that generally the drivers and escorts employed by

25 Consolidated and Lonero work out of the same yards.

### E. Discussion and Conclusions

30 The General Counsel argues that Respondent threw in the Consolidated runs and effected a mass layoff of employees to punish the employees as a group for their union and protected activities and to discourage such activities. The General Counsel points out that some of the employees who had been employed by Consolidated but were now employed by Lonero lost pension contributions because they were not fully vested. Further, General Counsel points out that under the Local 1181 contract, new Lonero employees were lower on the

35 seniority list, had a waiting period for medical benefits and did not receive full holiday pay during their first year of employment. The General Counsel cites cases holding that a mass layoff can unlawfully serve to discourage union and protected activities and punish the employees as a group even where not all the employees laid off engaged in the protected activities. The General Counsel observes that the Respondent's actions had the effect of cutting the existing

40 Local 854 bargaining unit at Consolidated and augmenting the Local 1181 bargaining unit at Lonero. According to General Counsel this was an attack on the TDU organizational efforts at Consolidated.

45 Respondent urges that Respondent's actions were motivated solely by business reasons

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<sup>14</sup> Garces was elected shop steward with the support of the TDU in February 2004. In December 2004 the Consolidated employees petitioned for a shop steward election and Garces was defeated by Ron Nigro.

<sup>15</sup> Pedro Garcia was discharged as a result of accidents with his school bus.

50 <sup>16</sup> Contrary to Garces' testimony, the seniority lists in evidence herein show that Salomon Viteri is still employed by Consolidated.



and a desire for monetary gain and that General Counsel has not shown any violations of the Act.

5 The record in the instant case, as fully described in JD(NY)-32-05, shows that beginning early in the year 2002 many employees of Respondent Consolidated engaged in a variety of union and protected activities with the support of and in conjunction with TDU. As found in the earlier Decision, Consolidated responded to this protected activity with coercive interrogations and unlawful surveillance and threats of suspension, discharge, arrest and unspecified retaliation. In addition, Respondent unlawfully suspended employees, subjected them to closer supervision and unlawfully issued warnings and singled out employees for testing. Thus, there is ample proof of Respondent's hostility to its employees' protected activities.

15 I do not find, however, that Respondent's hostility to its employees' union and protected activities was a motivating factor when it threw in the 168 Consolidated runs at the September 2004 pick. Curcio's testimony makes it clear that he wished to increase the revenue of his company. In the highly structured public school bus industry, the only method available to him was one which would enable him to perform the same work but at higher prices per vehicle per day. Curcio correctly judged that if he threw in the lower paid Consolidated work he could pick most of it up at the higher paid Lonero rate. Thus, his act in throwing in 168 runs was not contrived to be a mass layoff. Curcio knew that he would probably end the day of the pick with most of the 168 runs back in his possession. Under the Mollen Agreement, Curcio was aware that he would also find himself employing most of the former Consolidated employees at Lonero. Thus, I am convinced that Curcio had no expectation of ridding himself of employees who engaged in union and protected activities when he threw in the Consolidated runs. Further, Curcio knew that the collective-bargaining agreement between Lonero and Local 1181 was regarded as a better deal for employees than that between Consolidated and Local 854. The instant record is replete with references to Local 1181 as the leader in the industry. There is no dispute that immediately upon becoming employed by Lonero the former Consolidated employees received a wage increase. After an initial period of dislocation, the employees would find themselves enjoying better wages and benefits at Lonero than they had received at Consolidated. Such an outcome would hardly serve the purpose of punishing employees for their protected activities. I note that the testimony of Jose Guzman and other witnesses described in JD(NY)-32-05 shows that it was not uncommon for Consolidated employees to seek higher paying jobs with other companies.

35 Curcio's quoted statement to Rios and other employees is open to many possible interpretations and does not necessarily refer to his hostility to employees' protected activities. There is no evidence that Rios or any of the unnamed employees with her on that day had been TDU activists. There is no reference in Curcio's statement to any union or TDU issue. Telling employees that they knew "why this happened" could have meant anything, including the obvious fact that the industry uses a bidding process for routes and that companies throw in routes in the regular course of business.

45 Curcio testified, without contradiction and with ample documentary evidence, that every WBX-SB run thrown in by Consolidated and picked up by Lonero resulted in an increased revenue of \$65 per day. His calculation that this would amount to a gross increase of between \$1.6 million and \$1.7 million per year was not challenged by any evidence on the record. Curcio acknowledged that there would be an increase in wages to the drivers under the Local 1181 collective-bargaining agreement. The record shows that at the top of the scale a driver would

earn from \$80 to \$100 more per week at Lonero.<sup>17</sup> Although not insignificant, an increase in wages to a driver of even \$100 per week would not nullify a \$65 increase in price per vehicle per day amounting to \$325 per week. Indeed, it would be a foolish businessman who would neglect an opportunity to increase his revenue per vehicle by several hundred dollars each week.

It is significant that Respondent Consolidated also threw in 29 additional runs on the WM-HL route which were earning \$539.83 per vehicle per day. When 17 runs on the WBX-HL route unexpectedly became available at \$615.09 per vehicle per day, Consolidated picked those. Thus, Respondent readily added work to the Consolidated unit. This further convinces me that Curcio's motivation at the September 2004 pick was strictly financial: he was willing to keep drivers and escorts working at Consolidated so long as he could increase the revenue of the company.

I am not persuaded by General Counsel's argument that Curcio wished to move employees from Consolidated to Lonero to discourage their protected activities. As set forth in JD(NY)-32-05 the TDU activists at Consolidated engaged in such protected activities as protesting certain working conditions, filing grievances, demanding that their union take cases to arbitration and running candidates in shop steward elections. Manifestly, these employees may undertake these and other protected activities while working for Lonero. General Counsel seems to assume that once the employees are at Lonero they will not seek the support of the TDU or that the TDU will not aid them in their efforts. The record contains no evidence at all to support this. There is no indication that the TDU would refuse to assist members of TDU who sought to continue their protected activities at Lonero. In this regard it is significant that the employees of Consolidated and Lonero work out of the same yards and are managed by the same officials of Respondent.

I also do not find persuasive General Counsel's argument that Curcio's aim was to preserve a "business as usual" relationship with Local 854 and weaken the TDU movement at Consolidated by moving TDU activists out of the Local 854 unit. This argument is based on General Counsel's theory that Curcio received favorable treatment from Local 854. The record shows that Local 1181 is a much larger union than Local 854 and that it has a collective-bargaining agreement that is more generous to employees. It is not clear why it would be to Respondent's advantage, under this particular view of the case, to move a large number of employees into a unit represented by a Union that has more bargaining power and a more costly collective-bargaining contract. This is not the action of an employer seeking a "cozy" relationship with the representative of its employees.

Curcio acknowledged that Respondent had never before thrown in such a large number of routes as it did at the September 2004 pick. Curcio's reason for taking this extreme action in 2004 is eminently plausible. First, Curcio had recently acquired the Lonero WBX-SB runs. This purchase permitted Respondent to throw in the Consolidated runs with a reasonable expectation of picking them up again at a much higher price as the bidding process continued. Second, Curcio knew that if he did not attempt to increase his price per vehicle per day for the WBX-SB route at the September 2004 pick he would be committed to operating the 168 vehicles for five years at the lowest rate of any bus company without any hope of a significant increase. As he viewed it, this was a "do or die" moment in his industry.

I am convinced by the evidence that Respondent acted only for the purpose of

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<sup>17</sup> There is no evidence as to the length of time required to reach the top of the scale.

increasing its revenues and in anticipation of a new five-year contract with the OPT. But, even if I had found that Respondent's hostility to its employees' union and protected activities was a motivating factor in the decision to throw in the runs, I would also find that Respondent would have taken the same action in the absence of protected activities by its employees. The  
 5 motivation to increase revenues and the knowledge that this was the last year when such an opportunity was available would have spurred Respondent to take exactly the same action with respect to the Consolidated runs. *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 988 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

### 10 **Conclusions of Law**

1. The General Counsel has not shown that Respondent engaged in the violations of the Act alleged in the Complaint.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>18</sup>

### **ORDER**

The complaint is dismissed.

20 Dated, Washington, D.C.

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Eleanor MacDonald  
Administrative Law Judge

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<sup>18</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.